Jose A. Montano d/b/a A. Montano Electric *and* International Brotherhood of Electrical Workers, Local 441, AFL–CIO.

Jose A. Montano d/b/a A. Montano Electric *and* International Brotherhood of Electrical Workers, Local 11, AFL–CIO. Cases 21–CA–31126 and 21–CA–31128

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 19, 1997, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this decision, and to adopt the recommended Order.

The judge has concluded, inter alia, that the Respondent did not violate Section 8(a)(3) of the Act by denying five union-affiliated electricians the opportunity to work overtime on January 4, 1996, and by terminating them on January 6, 1996. As discussed below, we agree with these conclusions but we do not rely on the judge's rationale.

A. Montano Electric is a small, nonunion electrical contractor based in Anaheim, California. Jose A. Montano is the sole proprietor of the Respondent. At relevant times, the Respondent's core work force consisted of journeyman electrician Montano, helpers Javier Arevalo (Montano's son) and Nelson Amaya, and estimator Bob Florin. Montano hired other electricians, helpers, and laborers as needed to meet current job demands.

In December, Montano hired alleged discriminatees Mike Kaspar, Fred Young, and Gilbert Rojo as additional electricians.[2] Kaspar and Young, both members of IBEW Local 441, began work in early December and performed satisfactory work at various jobsites during that month. Rojo, an organizer for IBEW Local 11, began work for the Respondent on a couple of small jobs on December 29.[3] Throughout the month, none of these employees engaged in overt union activities, and Montano was unaware of their union affiliation.

In mid-December 1995, Montano was awarded the subcontract for electrical work on a project at the J. H. Frances Polytechnic High School in Sun Valley, California. The Sun Valley project was scheduled to begin during students' winter holiday vacation period. In apparent concern about the safety of having open trenchwork when school was in session, there was a firm deadline of January 8, 1996, the date classes were to resume, for the completion of all underground electrical work.

Montano, Young, and Kaspar worked a few hours at the Sun Valley site on some days in late December. Trench excavation for the installation of underground electrical wiring conduits began on approximately December 27. The project entailed a main trench and five other trenches of varying size and length.

On Tuesday, January 2, Montano assigned Young and Rojo to work at the Sun Valley jobsite. That morning, the Los Angeles Unified School District site inspector determined that the main trench excavated by Montano was unsafe. He ordered Montano employees to vacate the trench. Independently, Rojo had phoned the California OSHA to complain about the trench. An OSHA official arrived mid-morning and "red-tagged" the trench, closing it until proper shoring and other safety measures were in place.[4] Other conduit trenches remained open. There is no evidence that Montano was aware of Rojo's role in summoning OSHA.

Also on January 2, two representatives of Local 11 visited the Sun Valley site and talked with Montano. They discussed getting additional qualified electricians on the job from their union. Montano was falling behind in its work, a fact noted by the school district inspector in an official notice issued on January 3.[5]

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Montano also hired electrician Rick Soriano as the foreman for a job at Irvine Valley College.

[3] The judge erroneously stated that Rojo was hired in early December. This mistake has no material impact on the disposition of the unfair labor practice issues in this case.

[4] The judge erroneously stated that the trench was red-tagged on January 3, rather than January 2. This mistake has no material impact on the disposition of the unfair labor practice issues in this case.

[5] The inspector's project diary (R. Exh. 4) mentions this notice with the explanation that "ELECT DID NOT HAVE ENOUGH MANPOWER TO COMPLETE THIS JOB PRIOR TO SUN AS SCH. THIS WORK MUST BE COMPLETED TO NOT IMPACT THE SCHOOL."

Montano did hire two more electricians on January 3. He hired Richard Nightingale, who identified himself as a member of IBEW Local 11. He also hired Larry Blum, who Montano knew had come from this union.

On the same day, Montano learned about the union affiliation of the other three newly hired electricians. That morning, Rojo gave Montano his union business card, and an IBEW Local 441 representative faxed a letter to Montano that identified Young and Kaspar as members of that union. Later in the afternoon, having received these open declarations of union affiliation, Montano asked Rojo if he, Young, and Kaspar were union members. Rojo confirmed that they were.[6]

The Respondent began work at 7 a.m. on January 4 with an electrician crew of Rojo, Young, Blum, and Nightingale. They were to continue work on underground conduits other than the red-tagged main trench. At some point during the day, a California OSHA inspector removed the red tag from a portion of the main trench. Although Rojo testified that there was little work to do because the red-tagged trench area involved 60 percent of the job, no other witness corroborated this view. Furthermore, as discussed below, there was work still to be completed at the end of the regular workday on January 4.

Kaspar arrived at the Sun Valley site from another job at about 9:45 a.m. There is no evidence that any electrician had ceased work prior to then for the purpose of discussing union representation, wages, or working conditions. At about 10 a.m., Kaspar and Young presented Montano union authorization cards signed by the five electricians. Montano declined to recognize IBEW Local 11 as the employees' representative. He directed Kaspar and Young to return to work.

At about 11 a.m. that morning, Montano and Respondent's employees gathered for a safety meeting. (Montano either called the meeting himself or agreed to holding it.) The meeting lasted about 20–25 minutes. Towards the end of this meeting, Montano received a copy of a warning notice issued to the general contractor by the school district site inspector. The notice stated

> YOUR ELECTRICAL SUB HAS 6+ PERSONS ON THIS JOB THEY HAVE PRODUCED LITTLE OR NO WORK SINCE 7<u>00</u> AM IT IS NOW 11<u>00</u> AM. YOUR SUB WILL NOT COMPLETE WORK PER SCH. IF HIS MEN ARE VISITING AND NOT WORKING. THE L.A.U.S.D. IS CONCERNED THAT IF U/G WORK IS NOT COMPLETED BEFORE MON 1-8-96 THERE WILL BE A SEVERE SAFTY [SIC] PROBLEM WITH STUDENT S BACK ON THIS SITE.

When asked at the unfair labor practice hearing what the electricians were doing between 7 and 11 a.m., Montano credibly testified "It's absolutely nothing. They were walking back and forth. They were meeting, they were laughing. They would actually throw the [conduit] pipe. It was like a show really what—what they were doing that day. But real work they didn't."[7]

At about noon, the five electricians approached Montano as a group. They requested their unpaid back wages and the opportunity to complete government paperwork. It is undisputed that Montano had been paying all or most of the electricians in cash, with no deductions for taxes, and in amounts less than the prevailing wage rate required for public jobs like the Sun Valley project. In addition, none of the five alleged discriminatees had apparently been asked to fill out the necessary government tax and immigration forms for employment.

There is no evidence of any subsequent work stoppages on January 4 that were attributable to the electricians' workplace concerns. Kaspar testified that he and others voiced their concerns between 10 a.m. and noon. He acknowledged that Montano displayed no animus towards the electricians for these meetings. According to Kaspar, "[a]t no time during that, had [Montano] warned me or anybody else, get back to work or you'll be terminated, or get back to work, or else. He willingly sat there with us for two or three different meetings to work out situations that the employees felt that they weren't being treated too fairly with."[8]

At about 2 p.m., Montano approached Kaspar and Young at their assigned work location in a conduit trench. According to the credited composite testimony, Montano asked why they were "screwing around" and told them to get to work, shut up, and just get the project completed. Kaspar asked if Montano would ever hire union workers again. Montano replied that he needed workers who worked.

The regular workday ended at about 3:30 p.m. There was undisputedly work remaining to be done. Certain conduit needed to be encased in concrete. Montano declined the offer of one or more electricians to stay and do the work. Instead, he and helpers Arevalo and Amaya remained to complete the job. According to Montano, the remaining work was what the electricians had not done during the whole day shift. He also stated that he

[6] We affirm the judge's conclusion that Montano's inquiry did not constitute interrogation in violation of Sec. 8(a)(1). We also affirm the judge's conclusion that statements made to Kaspar at another jobsite by Respondent's estimator Robert Florin on January 3 did not violate Sec. 8(a)(1).

[7] Hearing transcript p. 236.

[8] Hearing transcript pp. 60–61.

did not need more than one or two people to finish the job.

On Friday, January 5, the electricians picketed the Sun Valley jobsite prior to the start of work and during their break time. Respondent's work progressed without any apparent delay. Sometime during the day, a California OSHA official removed the red tag from the entire main conduit trench. In addition, Montano complied with the electricians' request and provided them with government tax and immigration forms to complete. The school site inspector's project diary shows that all electrical work was complete and the conduits were encased by the end of the day. Montano told the electricians to report to work the next day in order to receive their back wages. He promised that they would receive 2 hours of wages for showing up on Saturday.

When the electricians arrived at the jobsite Saturday morning, they received checks for full backpay, with appropriate deductions. They were also informed that they were terminated. Montano told Rojo that the electricians had to leave the job because school officials and the general contractor did not want them there. Blum overheard Montano say that the trenches had to be filled by Monday's deadline, so there was nothing for the electricians to do on Monday. Payroll records introduced by the General Counsel show that some of the Respondent's employees, including one or two newly hired electricians, did perform other electrical work at both the Sun Valley and Irvine Valley College jobsites in subsequent weeks.

It is undisputed that the Respondent's stated reason for terminating the five union-affiliated electricians on January 6 was their alleged failure to perform work on January 4. This was also at least one stated reason for the Respondent's failure to permit the same employees to work overtime on January 4. (The other reason being the lack of any need for more than Montano and two helpers to finish the work remaining.) The judge found that the failure of the five alleged discriminatees to perform work on January 4 was due to their participation in an unprotected partial work stoppage or intermittent strike. In addition, she found that Kaspar and Young were not employees within the meaning of the Act.[9] She recommended dismissal of the 8(a)(3) discriminatory discharge and denial of overtime complaint allegations on these grounds.

We adopt the recommendation to dismiss, but we disavow reliance on the judge's rationale for doing so. The Respondent did not raise either legal argument used by the judge in defense of its challenged actions.[10] On the contrary, it simply claims that it took these actions because the five electricians failed to perform their work as expected and required for a full day at a time when a pending completion deadline made any delay particularly critical. On the other hand, the General Counsel contends that the electricians performed what work they could on January 4 and that the Respondent's stated reason of nonperformance is merely a pretext for retaliation against their recent disclosure of union affiliation and support.

Under the *Wright Line*[11] test for alleged 8(a)(3) and (1) discriminatory employment actions, the General Counsel bears an initial burden of introducing evidence sufficient to support the inference that protected concerted activity was a motivating factor in the employer's decision to act. In the instant case, it is undisputed that the Respondent knew about the alleged discriminatees' union activities and that it denied them overtime and then terminated them soon after becoming aware of these activities. There is, however, little credible evidence of the Respondent's animus towards union activity. The judge has dismissed, primarily on credibility grounds, all complaint allegations of coercive interrogations and threats.[12] Montano hired known union members Nightingale and Blum on January 3. Furthermore, General Counsel's witness Kaspar admitted that Montano "willingly" participated in meetings about the electricians' complaints on January 4. On January 5, Montano at least partially satisfied those complaints by providing the necessary government employment forms for the electricians to complete.

Under the foregoing circumstances, it might be said that the General Counsel has failed to meet his initial burden under *Wright Line*. Even assuming, arguendo, that an inference of antiunion motivation may be drawn, as the General Counsel suggests in exceptions, solely from the timing of the termination actions in relation to the sudden news that all electricians were union members who sought union representation for the Respondent's historically nonunion work force, we find that the Respondent has met its rebuttal burden of showing that it

[9] The judge based this finding on the rationale of another administrative law judge in *Aztech Electric Co.*, Case 21–CA–29201.

[10] We also note that the Board has reversed the judge's decision in relevant part in *Aztech Electric Co*., See 334 NLRB No. 25 (2001).

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See also *Manno Electric, Inc.*, 321 NLRB 280 fn. 12 (1995).

[12] Our dissenting colleague would apparently reverse the judge's credibility findings with respect to alleged statements made to Rojo on January 2. As previously stated, we find no basis for reversing the judge under *Standard Dry Wall*.

would have discharged these five employees, and denied them overtime 2 days earlier, even in the absence of their union activities.

We agree with the General Counsel's argument in exceptions that the record shows that the electricians spent relatively little time during January 4 engaged in work stoppages to discuss matters of union representation or working conditions. Our agreement in this respect favors the Respondent's case, however, not the General Counsel's, because credited or undisputed evidence shows that the electricians were not performing the work expected of them at times when they were not engaged in protected concerted activity.

As detailed above, there is no evidence of any work stoppages attributable to such activity prior to the presentation of union cards to Montano by Kaspar and Young at about 10 a.m. Yet slightly more than an hour later, the school district inspector warned that the Respondent had produced "little or no" work since the 7 a.m. beginning of the work day. Similarly, there is no evidence of any work stoppages attributable to protected concerted activity after the five electricians met with Montano at noon about back wages and government forms. Yet the credited testimony shows that in mid-afternoon Montano scolded Kaspar and Young and told them to get to work. Furthermore, it is undisputed that work remained to be done at the end of the day which, according to Montano's credible testimony, should already have been done by the electricians during the regular workday. What they *were* doing, as credibly described (albeit with some likely hyperbole) by Montano, was "walking back and forth. They were meeting, they were laughing. They would actually throw the pipe. It was like a show really—what they were doing that day. But real work they didn't."

We find that the Respondent has shown that it bore enmity against the electricians for failing to perform their work as expected on January 4.[13] This failure, which cannot be attributed to time spent engaged in protected concerted activities, drew criticism from school officials and the general contractor, impaired the Respondent's ability to meet an intractable job completion deadline, and likely jeopardized the Respondent's business reputation. We therefore find that the Respondent would have denied overtime work to the electricians and would have terminated them for their nonperformance even in the absence of protected concerted activities. Accordingly, we adopt the judge's recommendation to dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

My colleagues agree with the judge that the Respondent (Montano) did not violate the Act in connection with the interrogation, allegedly accompanied by threats, of certain employees and the discharge of five employees.

In contrast to my colleagues and the judge, I would find that Montano violated Section 8(a)(1) by virtue of the statements made by Robert Florin, Montano's estimator, to employee Michael Kaspar, on January 3. I would also find that Montano's discharge of the five employees violated Section 8(a)(3) because it was based not on their failure to perform work on January 4, but on their union affiliation and activities.

The Interrogation of Kaspar

The facts related to Kaspar's interrogation are described in the judge's decision: On January 3, the Union faxed a letter to the Respondent, stating that Kaspar was a member. In response to a question from Kaspar that day, Florin acknowledged receiving the letter. He also "asked Kaspar if he intended to bring any troubles to the job." When Kaspar said no, Florin stated, "If you're

[13] Contrary to the dissent, there is evidence that Blum and Nightingale failed to perform work as expected on January 4. Montano identified them as the only electricians even attempting to work, but his testimony did not exculpate them altogether from complicity in the electrician crew's misconduct. In fact, as two of the four electricians working on site prior to Kaspar's arrival, Blum and Nightingale must have had some role in what the site inspector described as the production of "little or no work" during the first half of that workday. We therefore disagree with the dissent that their termination by the Respondent can only be explained by their union membership.

We note further that the record does not support the dissent's claim that the termination of all electricians on Saturday, January 6 increased the likelihood that Montano would not meet his job completion deadline. The site inspector's job diary shows that no further electricians' work was scheduled after January 5. The timing of the discharge action therefore seems consistent with the Respondent's asserted justification for discharge. Having completed all underground conduit work by the deadline *in spite of* the electricians' misconduct on January 4, Montano decided that he would forego the risk of jeopardizing other jobs by retaining this crew in his employ.

smart and do things right, this Irvine Valley project could be too much for you and we could be looking at five years worth of work." Florin complimented Kaspar's work and skills. The conversation then was interrupted by a phone call for Florin. When he returned, Florin told Kaspar that Montano "wanted to know if Kaspar intended to cause labor problems." On being reassured by Kaspar, Florin said, "good, because this thing could turn into five years."

Citing Florin's compliments, the judge rejected the conclusion that the "import of Florin's words to Kaspar evidenced an intent to be more cooperative regarding future employment if Kaspar abandoned his interest in the Union." It seems to me, however, that Florin's remarks were clearly coercive. In a single conversation in which he claimed to be speaking for Kaspar's employer, Florin twice inquired about Kaspar's future union activity and twice linked that activity to Kaspar's employment prospects. In the context of talk about "troubles" on the job and "labor problems," an employee reasonably could understand a reference to being "smart" and "do[ing] things right" to mean foregoing union activity. Florin's intent, of course, is immaterial.[1] Whether Florin's statements are regarded as a promise, a threat or a mixture of both, they were unlawful. See, e.g., *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1103 (1983) (supervisor's statement that employee had "a bright future with this Company if you choose to make the right decisions" was unlawful threat of reprisal).[2]

The Discharges

My colleagues correctly reject the judge's rationale for upholding Montano's discharge of five employees. They conclude that Montano was motivated by lawful "enmity against the electricians for failing to perform their work as expected on January 4." This was what Montano was required to prove, under the *Wright Line* test,[3] but I do not believe he succeeded.

My colleagues express some doubt about whether the General Counsel met his own initial burden of proving that antiunion animus was a motivating factor in the discharges. To me, the evidence of antiunion animus was clear. The timing of the discharges certainly permits an inference of antiunion motivation. The discharged employees undertook a flurry of protected activity in the days leading up to their discharge, presenting Montano with legitimate complaints about their wages and working conditions—as well as signed union authorization cards. Although she condemned the "manner and timing of the presentation of issues" to Montano, the judge found that "each of the [salts'] actions, individually, raised legitimate work-related concerns." The record shows that until the salts raised concerns, Montano was failing to withhold taxes from employees' paychecks, was failing to comply with prevailing wage obligations on a public construction project and with immigration law requirements, and was violating occupational safety and health standards. It is no wonder that he opposed the Union's efforts.[4]

But there is a good deal more to suggest Montano's overriding motive for the discharges. Apart from Florin's unlawful statements to Kaspar, Montano himself made statements demonstrating animus: (1) on January 2, he told Gilbert Rojo that he would fire employees Kaspar and Fred Young if they were union members;[5] (2) on January 3, he told Rojo, "I just don't want unions," and said that he would not recognize or negotiate with the Union; and (3) on January 3, he told prospective employee Dean Todd, who identified himself as a salt, that he did not want to be a union contractor and refused to give Todd an application. Whether or not these statements independently violated Section 8(a)(1), they do show Montano's hostility to the Union.

Given the clear evidence of Montano's antiunion motivation, the question becomes whether he would have nevertheless have discharged the five employees solely for failing to perform work. To show this, Montano was required to prove not only that the five employees did, indeed, fail to perform work and that their failure was not attributable to engaging in protected activity, but also that he would have discharged them as a result. Montano's proof fell short.

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[1] E.g., *Douglas Foods Corp.*, 330 NLRB No. 124, slip op. at 1 (2000), enfd. in relevant part, 251 F.3d 1056 (D.C. Cir. 2001) ("[A]n employer statement violates Section 8(a)(1) if it would have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights, without regard to the [employer's] intent.").

[2] Although the judge did not expressly make a finding that Florin was Montano's agent or supervisor, it is clear from the record that he was, at the very least, an agent for purposes of his statements to Kaspar.

[3] 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 292 (1983).

[4] Notably, this case involves the salting campaign of the union, IBEW Local 441, involved in *Aztech Electric Co.*, 334 NLRB No. 25 (2001). In my concurring opinion in *Aztech*, I argued that a salting campaign that involves the aggressive pursuit of legal remedies for employer misconduct is protected activity, even if it means that employers who break the law are driven out of business. This case helps explain what may inspire such campaigns.

[5] The judge both credited and discredited Montano's denial that he made this statement, at different points in her decision. In any case, Montano's testimony did not amount to a specific denial of the statement Rojo attributed to him.

With respect to two of the discharged employees, Richard Nightingale and Larry Blum, the record does not specifically show that they ever failed or refused to perform work. Montano's testimony about the work of Nightingale and Blum was uniformly positive. They were, however, union members, and it seems clear that they were included in the discharge for that reason alone.

As for the other three employees, even crediting Montano's testimony concerning their failure to work during periods when they do not appear to have been engaged in protected activity, I cannot conclude that under the circumstances, Montano would have fired them in the absence of their union affiliation. Of course, it is not enough for Montano to show that he *could* have fired the employees. See, e.g., *Structural Composites Industries*, 304 NLRB 729 (1991).

The judge did not find that Montano had no future work for the discharged employees. Montano continued to employ other workers on the project involved in this case, after an apparent January 8 deadline for completion. If Montano was concerned about meeting the deadline, then the discharges seem counterproductive. Montano regarded at least some of the discharged employees (Nightingale and Blum) as good workers. If, on the other hand, the work was done and thus there was no pressure to meet the deadline, then the discharged employees' asserted failure to perform work would not seem to furnish pressing cause for their termination. In any case, Montano never warned the workers, imposed lesser discipline, or gave them an ultimatum. Instead, he fired them. Surely their union affiliation, and not their failure to perform work, is the real explanation for this decision, in light of Montano's antiunion animus.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

John Kloosterman, Esq., and Jean Libby, Esq., for the General Counsel.
Astrid Arevalo, Javier Arevalo, and Jose Montano, for Respondent.
David Lawhorn, for IBEW Local 441.
Gilbert Rojo, for IBEW Local 11.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Los Angeles, California, on June 25, 26, and 27, 1997. The consolidated complaint, issued January 3, 1997, alleges that Jose A. Montano d/b/a A. Montano Electric (Respondent) violated Section 8(a)(1) and (3) of the Act by reducing work assignments, by interrogating and threatening employees, and by discharging five employees because they were members of and supported International Brotherhood of Electrical Workers, Local 441, AFL–CIO (Local 441) and International Brotherhood of Electrical Workers, Local 11, AFL-CIO (Local 11 or collectively, the Union).[1] The relevant events occurred in December 1995 and January 1996[2] at the J. H. Frances Polytechnic High School job site in Sun Valley, California.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions.[3] On the entire record, including my observation of the demeanor of the witnesses, and after considering the oral argument by counsel for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION AND LABOR ORGANIZATION STATUS

During the 12-month period ending March 1, 1996, Respondent, a sole proprietorship, provided services valued in excess of $50,000 for other enterprises located within the State of California, each of which other enterprises, during the same period, performed services valued in excess of $50,000 in States other than the State of California, or sold and shipped from its California locations goods valued in excess of $50,000 directly to points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 441 and Local 11 are labor organizations within the meaning of Section 2(5) of the Act.

[1] The charge in Case 21–CA–31126 was filed by Local 441 on January 23, 1996, and amended on December 11, 1996. The charge in Case 21–CA–31128 was filed January 25, 1996, by Local 11 and amended December 10, 1996.

[2] Unless otherwise specified, all dates are in 1996.

[3] Jose A. Montano, the sole proprietor of Respondent, appeared without counsel. Based upon my observation of Montano throughout the hearing, I have concluded that he understands English fairly well. Nevertheless, prior to the hearing, I instructed counsel for the General Counsel to offer to provide a translator for Montano throughout the hearing. Montano refused the offer. In addition, although advised that he had a right to counsel, Montano stated that he did not want an attorney because he could not afford to pay for one. Montano was represented by his daughter and son. Although witnesses were sequestered, I allowed Montano as well as his daughter and son to remain in the hearing room throughout the hearing. In some instances, the transcript indicates partial comments by Montano or his daughter or son. These partial comments were followed by family caucuses which were not audible on the record.

[4] Credibility resolutions have been made based upon a review of the entire record and the exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a small, nonunion electrical contractor based in Anaheim, California. Respondent utilizes Bob Florin as its estimator. Jose A. Montano, his son Javier Arevalo, and a helper, Nelson Amaya, form the steady worker complement. Other employees are hired as needed.

Alleged discriminatees Mike Kaspar, Fred Young and Gilbert Rojo applied for work with Respondent and were hired in early December 1995. Kaspar's resume did not mention any union affiliation. Rojo and Young, who were hired after telephone interviews with Montano, did not reveal their union affiliation to Montano at the time they were hired. Kaspar, Young, and Rojo worked on various jobsites during December 1995. There is no dispute that Respondent was satisfied with the quality of their electrical work.

Young and Rojo were assigned to work at the J. H. Frances Polytechnic High School in Sun Valley on January 2.[5] On January 3, Respondent hired alleged discriminatees Richard Nightingale and Larry Blum. Montano knew Nightingale was a member of the Union at the time of hiring him because Nightingale introduced himself as a member of IBEW Local 11 looking for work.

On Thursday, January 4, Kaspar also reported to work at the Sun Valley jobsite. At about 10 a.m. that day, Montano was presented with authorization cards signed by the five alleged discriminatees. Montano refused to recognize the Union and told the employees to get back to work. It is undisputed that very little work was performed on January 4. On that day, various concerns regarding safety, insurance, wages, hours, and terms and conditions of employment were brought to Montano's attention by the five alleged discriminatees. These concerns included several requests for back wages, contacting the Wage & Hour Division of the Department of Labor, a request to complete Federal paper work including I–9 and W–4 forms, trench safety, a request for safety meetings, and a request for health insurance. A call to OSHA the previous day had resulted in the main trench being "red tagged."[6]

On Friday, January 5, the five alleged discriminatees picketed before work and at lunch break. The signs said that Respondent did not provide health insurance and did not pay taxes. On Saturday, January 6, Respondent paid the five alleged discriminatees all back wages owed to them and announced that there was no further work for them. Pursuant to a petition for representation filed by the Union, a consent election was scheduled for March 22. The petition was withdrawn prior to the election.

B. Alleged Interrogations and Threats

Montano

Montano allegedly interrogated employees on two occasions and threatened employees with refusal to hire union members in the future.[7] Interrogation is not, by itself, a per se violation of Section 8(a)(1). An interrogation is coercive if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 187 (1993). Under this totality of circumstances approach, such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are examined. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

The first allegation of interrogation was related by Dean Todd, a member of Local 11, and corroborated by Rojo. Todd testified that he spoke with Montano on January 3. Todd introduced himself to Montano as an electrician in search of employment and gave Montano his resume. In addition to listing Todd's qualifications as an electrician, the resume indicated that Todd's "objective" was to promote the advancement of employees in the electrical industry by organizing them for IBEW. His experience included 2-1/2 years as business representative for Local 11 and he listed training in IBEW labor management cooperation, organizing, and representation. His references were business representatives of Local 11. According to Todd, Montano noticed union insignia on Todd's pocket protector before looking at the resume and asked if Todd was a member of the Union. Todd responded that he was. After studying the resume, Montano asked Todd if Todd's objective was to organize his shop. Todd stated that it was not. Montano replied that he was not a union contractor and did not want to be a union contractor. There is no allegation that Respondent refused to hire Todd because of his union activity. Montano denied this interrogation stating, "Why did I have to ask this type of question when I didn't have any knowledge at the time of anything that had to do with the Union." Montano indicated, in addition, that he did not specifically recall Todd.

I find that Montano asked Todd if he was a union member before reading the resume proffered by Todd.[8] However, I conclude that under the circumstances no violation occurred. Todd wore union insignia to the interview. Accordingly, as conceded by counsel for General Counsel, Todd was an open union ad-

[5] Young was actually assigned to the job in mid-December 1995 in order to look over the blue prints of the job, assemble a materials list, and plan the progress of work. Montano was dissatisfied with Young's performance of these tasks but did not discuss the matter with Young. Because Respondent does not rely on Young's December 1995 performance as a reason for Young's discharge, it is unnecessary to elaborate further regarding this matter.

[6] Kaspar explained that an OSHA red tag indicates that the location so marked is dangerous and cannot be worked in until the condition is corrected. According to Rojo, he caused a call to OSHA to be made because he noticed, "some very hazardous working situations. . . . And there was no material on the job. There was an extreme lack of tools and there was just no way you could proceed doing anything. There was no ladders for getting—no egress in and out of the trenches; just a horrendous type of situation."

[7] Further 8(a)(1) allegations—that Respondent announced shut down of the Sun Valley job and layoff of employees because of the employees' union membership—will be discussed infra with the 8(a)(3) allegations.

[8] Todd's testimony was somewhat contrived. However, based upon Montano's inability to recall Todd and his equivocal denial of the questioning, I find that Montano may, indeed, have questioned Todd.

herent at the time he applied for the job. Although Montano, the hiring official of Respondent, asked the question of Todd during a job interview, I find under the circumstances the interrogation did not reasonably interfere with Todd or other employees' exercise of their rights under the Act. See, e.g., *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Regarding Montano's further question as to whether Todd's objective was to organize Respondent, I similarly find no coercive impact. According to Todd's testimony, Montano had by this time read Todd's resume and knew that Todd was an open and active union supporter whose objective was to organize for the Union.

The second allegation of interrogation involves Peter Smith. Smith testified that he dropped his resume through Respondent's mail slot in early December 1995. Montano contacted Smith by phone shortly thereafter and told Smith he did not have any work at the time. According to Smith, Montano spoke with him by telephone at about 11 a.m. on January 4 and began the conversation by asking if Smith was with the Union. Smith replied that he was not and asked why Montano wanted to know. Montano replied that he was having problems with the Union and he wanted to replace some employees who were trying to organize his shop. Montano offered Smith a job but Smith did not accept.[9]

Montano stated, "I can't think that it's possible that I might have asked them [referring to Todd and Smith]. . . . Could be possible that I might have asked that. But, not necessarily, so." Montano did not deny speaking with Smith. Nevertheless, I find that Smith's testimony simply strains credulity. According to Rojo, on Friday, January 5, six individuals applied for work with Montano and Montano told them he was not hiring.[10] Accordingly, there would have been no reason to call Smith the prior day. Moreover, Montano's demeanor and manner of speech when speaking in English were simply not as sophisticated as Smith described. Accordingly, I am unable to credit Smith's testimony.[11]

Although counsel for the General Counsel contended throughout the hearing that the testimony of Smith supported that above allegation of interrogation, during closing argument he also argued that testimony of Rojo supported this allegation. Specifically, Rojo testified that he gave Montano his business card in the morning of January 3 and told Montano that he and Young were union members. Later in the afternoon, according to Rojo, Montano asked him if he, Young and Kaspar were union members. Rojo responded that they were. Rojo had just handed Montano a business card identifying himself as a business representative for Local 11. David Lawhorn, business representative for Local 411, sent a fax to Montano at 9:37 a.m. on the same date identifying Young and Kaspar as union employees.[12] Under these circumstances, I find that the interrogation did not reasonably interfere with Rojo's or other employees' exercise of their rights under the Act pursuant to the analytical framework of *Rossmore House*, *supra*.

The third allegation regarding Montano is that he told employees he would not hire union employees in the future. At noon on January 4, the five alleged discriminatees quit working and approached Montano as a group. They requested back wages and asked that government paperwork be completed. Montano stated that their back wages would be paid on the following day. At their request, the employees complete I-9 and W-4 forms. As stated earlier, very little electrical work was performed this day and Montano was being pressured by school officials to complete the work before students came back from the holiday break on Monday, January 8.

At 2 p.m. on January 4, Montano spoke with Kaspar and Young. He asked them why they were "screwing around" and told them to get to work, shut up, and just get the project completed.[13] Kaspar asked Montano if he would ever hire union members again in the future. Montano replied that he would not. According to Montano, he stated that he needed workers who worked. I credit Montano. Accordingly, I find no violation.

Florin

Florin is alleged to have told Kaspar that Respondent would be more cooperative regarding future employment if employees abandoned their interest in the Union. He is also alleged to have threatened Kaspar with legal action for engaging in union activity. Respondent denies these allegations and denies that Florin is its agent or supervisor. Florin did not testify.

As mentioned above, on January 3, Lawhorn faxed a letter to Respondent stating that Kaspar and Young were members of the Union. Later that day, Kaspar said to Florin, "well you probably know that I'm in the union by now." Florin responded affirmatively. At the end of the day, Kaspar asked Florin if he

[9] Counsel for the General Counsel also relied on testimony of Rojo regarding a telephone conversation between Rojo and Montano on the evening of January 2. According to Rojo, Montano quested him about his union activities as well as those of Young and Kaspar. I credit Montano's denial that he interrogated anyone prior to learning of union activity. There is no evidence that Montano was aware of any union activity at this time. This is consistent with the testimony of Young who related that two representatives from Local 11 met with Montano to discuss getting more qualified electricians on the Sun Valley job on January 2. At a "later" time, Young testified that Montano asked Young how he knew the two men and Young replied that he knew them through the Union. Montano asked if Young was Union and Young replied affirmatively stating, "It didn't seem to bother him [Montano] at that point. At that point, we hadn't picketed or done any real concerted activities." Montano's question of Young is not alleged to violate the Act.

[10] There is no allegation that failure to hire these individuals was violative of the Act.

[11] Similarly, I do not credit Smith's testimony that Montano told him that he wanted to replace some employees who were trying to organize his shop.

[12] Respondent denied receipt of this fax. However, based upon the fax transmission verification record, it appears the fax was transmitted at 9:37 a.m. on January 3.

[13] Kaspar testified that Montano also stated, "Why are you guys doing this to me? I hate the union; I hate the labor problems; why are you screwing me around like this; I don't want this to happen; I want you guys to work; shut up; and just get this project done." Young's embelishments did not corrborate Kaspar's version of this part of the conversation. I do not credit either of them regarding these statements.

had received the fax from the Union. Florin stated that he had and asked Kaspar if he intended to bring any troubles to the job. Kaspar said no. Florin then told Kaspar, "If you're smart and do things right, this Irvine Valley project could be too much for you and we could be looking at five years worth of work." Florin also complimented Kaspar on his fine work and said that his union training probably meant Kaspar was a good worker. Florin was interrupted by a phone call which ended by Florin saying, "I'll ask him when I get off the phone." Florin returned and said Montano wanted to know if Kaspar intended to cause labor problems. Kaspar reassured Florin who responded, "good, because this thing could turn into five years." This exhausted Kaspar's recollection of the conversation. In response to two leading questions regarding whether any adverse consequences or legal action was mentioned because of his union membership, Kaspar recalled that Florin told him that Montano could sue him for not saying he was in the Union when he was hired.[14]

I am unable to conclude that the import of Florin's words to Kaspar evidenced an intent to be more cooperative regarding future employment if Kaspar abandoned his interest in the Union. Rather, I find that Kaspar's testimony regarding Florin's remarks must be construed in the context of Florin's view that Kaspar was a good worker and that his union training had been beneficial. After all, the fact that Kaspar had identified himself as a union member did not deter Florin from wanting Kaspar to remain employed. Accordingly, I construe Florin's remarks, as related by Kaspar, to mean that if Kaspar was smart about his work and performed his work correctly, there would be more work. As to Florin's alleged further remark—that Montano could sue Kaspar for not reporting that he was in the Union when he was hired—I do not credit Kaspar's testimony due to his faulty memory.

C. Alleged Reduction in Work Assignments and Discharges

Facts

Montano received a note from the project supervisor indicating that little or no work was completed from 7 to 11 a.m. on January 4 and asking what the electricians were doing during that time. Montano observed the five alleged discriminatees requesting meetings or walking around laughing and throwing pipe. Very little work was performed. As mentioned in the background section, this was the day that Montano received the authorization cards from the five alleged discriminatees.[15] Young spoke to the project supervisor who told Young that he had no trouble with organizing but he did have a problem with stopping an entire account. The supervisor continued that there was a deadline of January 8 for completion of the project because winter vacation would be over on that date and students would be returning to school.

Montano stated,

> I still don't understand what was being done. But it's true that Gilbert Rojo was working, but at the same time, and in additionally to it, he would be talking to these two men. And, all of a sudden, also he would stop the other two men and then—then all of his six people were together. This produced some consternation to all of the school. Oh, I'm referring to the principal, the head of the school, because they were watching what this was—while this was taking place. And, themselves they didn't understand what was going on.

When Montano was asked what the alleged discriminatees did that day, he stated, "It's absolute nothing. They were walking back and forth. They were meeting, they were laughing. They would actually throw the pipe. It was like a show really—what they were doing that day. But real work they didn't."

At quitting time on Thursday, January 4, Montano, Arevalo and Amaya stayed to complete conduit installation which was to be encased in concrete that evening. Kaspar asked if the five alleged discriminatees could stay and do the work.[16] Montano told them that he did not need their help to complete the work. In his view, the five alleged discriminatees should have completed the work before quitting time and, in any event, the work remaining at quitting time could be completed by one or two workers.[17]

On Friday, January 5, Montano told Kaspar and Nightingale that the project was being shut down.[18] Montano told the five alleged discriminatees to report on Saturday, January 6, to receive their back wages. The alleged discriminatees demanded 2 hours show up time for coming in on Saturday. Montano agreed to this.

On Saturday, January 6, Rojo and Montano spoke at about 8 a.m. while sitting in Montano's vehicle. None of the other alleged discriminatees was present. Montano told Rojo that the five alleged discriminatees had to leave the job because they

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[14] Kaspar also responded to a leading question, "He told me that if I just did good work and keep my mouth shut about the union, I would be employed for a long time." I find that this was Kaspar's summary of the conversation which he had already fully detailed in his prior testimony and I do not credit his conclusory rendition. According to Kaspar, Montano and his son Javier Arevalo arrived on January 3 and spoke with Kaspar and Florin. Kaspar testified that Montano told him, "I don't want any union troubles in my company," and "I hate the union; I don't want to be in the union." Montano denied making such statements. I credit his denial.

[15] Kaspar testified that he handed the authorization cards to Montano on January 4 while Rojo testified that he delivered the cards to Montano on January 5. Kaspar further testified that Montano acknowledged that each of the signatures was an employee of his and then said, "I don't want to be union, I hate the union, I don't care what you sign. I don't want to be in the union." I do not credit this testimony or similar testimony regarding a conversation with Kaspar and Rojo on January 5.

[16] Kaspar testified in response to the question, "Was there work to be done that day?": "Well, at the time, there was at least one concrete truck waiting outside to come and pour concrete in some of the ditches that we had been working in. . . ." It is unclear to me what electrician work was encompassed in pouring concrete.

[17] I do not credit Rojo's testimony that Montano said, "You all have to go. All the union fellows gotta get off the job."

[18] I do not credit Nightingale's testimony that Montano told him on January 5 that this would be his last working day because Montano would not run a union shop. Nightingale was asked leading questions to elicit this response and I find his memory faulty with regard to the conversation. However, I do credit Blum's testimony that Montano stated he was worried on January 5 that he was going to lose the project because of the union's actions the prior day.

did not do the work and the school officials and the general contractor did not want them there because they were a bad example to the students. Blum also heard Montano say that the trenches the electricians had been working in had to be filled up because school was starting on Monday and there was nothing the electricians could do on Monday.[19]

Analysis

Union organizers who work for nonunion companies pursuant to a "salting" policy are generally qualified as employees within the meaning of Section 2(3) of the Act. *Town & Country Electric*, 309 NLRB 1250, 1258 (1992), enf. denied, 34 F.3d 625 (8th Cir. 1994), enfd. 516 U.S. 85 (1995). The alleged discriminatees Kaspar, Rojo, Young, Nightingale, and Blum were union "salts" and entitled to engage in acceptable salting activities. In the absence of objective evidence to the contrary, no inference of disabling conflict of interest nor a presumption that, if hired, a union salt will engage in activities inimical to the employer's operation, is appropriate. *Town & Country Electric, supra*, 309 NLRB at 1257; *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992).

In *Aztech Electric Co.*, JD(SF)–73–97, administrative law judge Gerald A. Wacknov analyzed objective evidence of the salting activities of Local 441. After a thorough description of the program, Judge Wacknov stated, JD at 63,

> It seems clear that the Union's "organizing" efforts have proved to be highly unsuccessful and that despite numerous and persistent attempts to "organize" over a period of some five years there have admittedly been a relatively few instances of positive results. Thus, according to the equivocal testimony of Business Representative Lawhorn, since 1992 there have been about 10 contractors that have signed contracts with the union as a result of the Union's organizational activities; however, Lawhorn also testified that he "doesn't have any idea why these contractors on salted projects sign with Local 441." It is puzzling, therefore, that, Lawhorn believes that the salting program has been successful.

From the foregoing, namely, the relatively insignificant number of new signatory contractors, juxtaposed with the Union's puzzling emphasis on the success of its salting program, it may be concluded that the union measures its success not in the traditional sense of "organizing," but in the number of nonunion contractors it eliminates as competitors in its "battle for survival. . . ."

Judge Wacknov concluded that a "disabling conflict" existed in that the motive and purpose of local 441's salts was to engage in activities inimical to the employer's operations. Thus, he concluded that the salts were not employees within the meaning of Section 2(3) of the Act. (JD at 65). I take judicial notice of Judge Wacknov's decision.[20] One of the "salts" therein, Mike Kaspar, as well as business representative Lawhorn were involved in both *Aztech* and this case. Moreover, I conclude, in agreement with Judge Wacknov, that an important goal of the salting program of Local 441, is, "to create confrontations with [nonunion] contractors for the purpose of generating unfair labor practice charges, whether ultimately meritorious or not, in furtherance of an objective to impact the contractors' financial viability. . . ." and that this purpose constitutes a disabling conflict as envisioned in *Town & Country*. According, I find that the Local 441 discriminatees Kaspar and Young were not employees within the meaning of the Act. The three other alleged discriminatees, Rojo, Nightingale, and Blum, were members of Local 11. There is no evidence that they adopted the salting objectives of Local 441.

Nevertheless, I find no violation of the Act with regard to Rojo, Nightingale, and Blum. Although unrepresented employees, such as these three alleged discriminatees, are entitled to act in concert to protest terms and conditions of employment,[21] not all concerted activities are protected. Various factors, analyzed on a case by case basis, determine the contours of the Act's protection.[22] In this case, the five alleged discriminatees performed no work during the morning of January 4 and little work during the remainder of the day. Their actions were timed intermittently and I infer that this timing was the product of careful orchestration.[23] The manner and timing of the presentation of issues to Respondent were certainly intended to harass and confuse Respondent. Although each of the actions, individually, raised legitimate work-related concerns, the alleged discriminatees did not choose to strike. Rather, their actions amounted to a partial work stoppage or intermittent strike. Such job actions are unprotected.[24] Accordingly, I find no violation in failure to assign overtime work to them on the evening of January 4 nor in failing to use their services for further projects.

[19] Rojo testified that Montano told him that the job was taken away from him because of the Union. Nightingale, Kaspar, and Young testified that they spoke directly to Montano who told them there was no more work on the project because of union problems and there was no further work for any of the five alleged discriminatees on any other projects. I find it more likely that they were told this by Rojo who was the only one who spoke with Montano directly. I do not credit Rojo's version of the conversation with Montano including his assertion that he would never hire union members again. In making this determination, I rely primarily on the fact that Young and Kaspar were both told by the project superintendent that there was a deadline of January 8. In addition, I credit Montano as corroborated by Blum in attributing lack of work on the following Monday, January 8, to the project being on deadline. Accordingly, the allegations that Montano violated Sec. 8(a)(1) by announcing the shut-down of the job because of employees union activities and announcing layoff of employees due their union membership are dismissed.

[20] See, e.g., *Pottsville Bleaching Co.*, 303 NLRB 186, 191 fn. 11 (1991); *Southern Maryland Hospital*, 288 NLRB 481 fn.2 (1988).

[21] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

[22] See, e.g., *Interlink Cable Systems*, 285 NLRB 304, 306 (1987), and cases cited therein.

[23] This inference is well founded. The five employees possessed considerable expertise in labor law matters. One was a business agent. Another, Michael Kaspar, had "salted" on over 100 occasions. See, e.g., *Aztech Electric Co.*, JD(SF)–73–97 at 20–22. These two employees had worked for the Respondent for over a month. None of their concerns were raised until the morning of January 4.

[24] See, e.g., *United States Service Industries*, 315 NLRB 285 (1994).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 11 and Local 441 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act as alleged in the consolidated complaint as amended at hearing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The complaint is dismissed.

25If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.